

CHAPTER
2

Utilising international, regional and comparative law in domestic courts

2.1 Introduction

This chapter outlines some of the arguments for use of international, regional and comparative law in domestic courts in southern Africa.

Checklist

- ▶ Is your domestic legal system monist or dualist?
- ▶ If monist, then international and regional law is directly enforceable.
- ▶ If dualist, does your Constitution provide any guidance on the relevance of international, regional and comparative law in domestic litigation?
- ▶ If dualist, is there any jurisprudence that outlines the relevance of international, regional and comparative law in domestic litigation and/or which uses international, regional or comparative law in reaching its decision?
- ▶ If dualist, cite jurisprudence from other similarly-situated countries where courts have taken into account international, regional and comparative law.

Selection of relevant cases discussed in this chapter

- Attorney-General v Dow
- Ephraim v Pastory
- Ex-Parte Attorney General: In re Corporal Punishment by Organs of State
- Government of the Republic of Namibia and Others v Mwilima and Others
- Legal Resources Foundation v Zambia
- Mojekwu v Ejikeme
- Odafe and Others v Attorney General and Others

- President of the Republic of Mozambique v Ncomacha
- Rono v Rono
- Société des Femmes Tchadiennes Transitaires v Ministère des Finances
- Ts'epe v The Independent Electoral Commission and Others
- Zimbabwe Human Rights NGO Forum v Zimbabwe

2.2 Use of International, Regional and Comparative Law in Domestic Courts

International and regional human rights law may offer a more robust jurisprudence than what is available from domestic precedent, allowing for more expansive interpretations and firmer defense of progressive principles. The main role of international and regional human rights law in public interest litigation should be to assist domestic courts in interpreting constitutionally-recognised rights, especially given that international human rights treaties have influenced the constitutions of many African countries.²⁷

Most countries in southern Africa have dualist legal systems where international and regional legal obligations are neither justiciable nor directly enforceable in domestic courts without further action on the part of domestic legislatures. However, a few countries in the region, such as Mozambique, have monist legal systems whereby ratified international and regional treaties automatically become part of domestic law.

It should be noted that, in practice direct applicability of international and regional human rights law is sometimes avoided by the courts, even in monist civil law African courts.

An example is the Chadian Supreme Court case of *Société des Femmes Tchadiennes Transitaires v Ministère des Finances*²⁸ where the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is briefly mentioned to support the Court's interpretation of a constitutional non-discrimination clause.²⁹ Similarly, the Supreme Court of Rwanda recently referred to CEDAW, as well as comparative case law

²⁷ For example, international human rights law substantially influenced the drafting of the South African Bill of Rights. The influence of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of the Child (CRC) is evident in the economic, social and cultural rights and the children's rights included in the Bill of Rights, and section 31 of the Bill of Rights was clearly modeled on article 27 of the International Covenant on Civil and Political Rights (ICCPR). Moreover, State obligations in the CRC have been enacted in numerous domestic African jurisdictions, such as the Ghanaian Children's Act (1998) and Juvenile Justice Act (2003) as well as the Kenyan Children's Act (2001). **See** O G Odhiambo "The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context" Thesis submitted at the University of the Western Cape, South Africa, (2005) available at http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_init_9110_1176963955.pdf (accessed 26 August 2013).

²⁸ AHRLR 104 (ChSC2005) (2005) 13 December 2005 available at <http://www1.chr.up.ac.za/index.php/browse-by-subject/250-chad-societe-des-femmes-tchadiennes-transitaires-v-ministere-des-finances-2005-ahrlr-104-chsc-2005.pdf> (accessed 26 August 2013).

²⁹ *Id* at para 14.

from South Africa, the United States and Canada in reaching a decision.³⁰

In Namibia, where international law is directly applicable, unless otherwise provided for by the Constitution or an Act of Parliament, the Supreme Court held in *Ex-Parte Attorney General: In re Corporal Punishment by Organs of State*,³¹ that constitutional interpretation was “a value judgement which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in the civilised international community which Namibians share”.³²

However, in a handful of instances, courts in monist countries have directly applied international human rights treaties. For example, the Supreme Court of Mozambique held in *President of the Republic of Mozambique v Ncomacha*³³ that traditional authorities were required to consider both constitutional principles and international human rights law in making their judicial decisions.³⁴ In that case, the Supreme Court held that traditional authorities had breached both the Convention on the Rights of the Child (CRC) and the International Covenant on Civil and Political Rights (ICCPR) by forcing a six-year-old girl to leave her family to live with a man until she gave birth to a daughter, in order to compensate him for the death of one of his children.³⁵

Interestingly, the Namibian Supreme Court recently held in *Government of the Republic of Namibia & Others v Mwilima & Others*³⁶ that article 14(3) (d) of the ICCPR took precedence over conflicting provisions in domestic law, namely the Legal Aid Act.³⁷

If the domestic legal system is dualist, whereby a country’s international and regional legal obligations are not directly enforceable in domestic courts, international and regional law can still impose obligations on countries that have ratified particular treaties. The African Commission on Human and Peoples’ Rights (African Commission), which is responsible for monitoring compliance with regional human rights treaties, in *Legal Resources Foundation (LRF) v Zambia*³⁸ noted that “international treaties which are not

³⁰ See RS/Inconst/Penal. 0001/08/CS, Supreme Court of Rwanda 26 September 2008 cited in M Killander & H Adjolohoun, “International Law and Domestic Human Rights Litigation in Africa: An Introduction” in M Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa*, 2010, 8 available at http://www.pulp.up.ac.za/pdf/2010_17/2010_17.pdf (accessed 26 August 2013).

³¹ 1991 (3) SA 76 (NmSc) available at <http://www.saflii.org.za/na/cases/NASC/1991/2.pdf> (accessed 26 August 2013).

³² *Id.*, 20.

³³ Supreme Court (Tribunal Supremo), Criminal section I, Proc.5/2004-A cited in M Killander & H Adjolohoun *supra* note 30, 9.

³⁴ M Killander & H Adjolohoun *supra* note 30, 9.

³⁵ *Id.*

³⁶ [2002] NASC 8 (7 June 2002) available at <http://www.saflii.org.za/na/cases/NASC/2002/8.html> (accessed 26 August 2013).

³⁷ *Id.*, 72.

³⁸ African Commission Communication No. 211/98 (2001) available at <http://www1.umn.edu/humanrts/africa/comcases/211-98.html> (accessed 26 August 2013).

part of domestic law and which may not be directly enforceable in the national courts, nonetheless impose obligations on State Parties.”³⁹

Moreover, the African Commission noted in *Zimbabwe Human Rights NGO Forum v Zimbabwe*⁴⁰ that:

Human rights standards do not contain merely limitations on State’s authority or organs of State. They also impose positive obligations on States to prevent and sanction private violations of human rights. Indeed, human rights law imposes obligations on States to protect citizens or individuals under their jurisdiction from the harmful acts of others. Thus, an act by a private individual and therefore not directly imputable to a State can generate responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or for not taking the necessary steps to provide the victims with reparation.⁴¹

Given that a country’s international and regional legal agreements does impose obligations, lawyers should first look to domestic law to persuade courts to take into account international, regional and comparative jurisprudence.

In some countries, domestic constitutional provisions provide for courts to look at international, regional and comparative law in reaching their decisions. For example, section 11(2)(c) of the Malawi Constitution states that, in interpreting the provisions of the Constitution, courts shall, “where applicable, have regard to current norms of public international law and comparable foreign case law”.⁴²

Similarly, in South Africa, the Constitution provides under article 39(1) that:

When interpreting the Bill of Rights, a court, tribunal or forum-

- a. ...;
- b. *must* consider international law; and
- c. *may* consider foreign law. (emphasis added)

In other countries, statutes on interpretation provide for courts to look to international, regional or comparative law. For example, section 24(1) of the Interpretation Act of Botswana⁴³ provides that a court may have regard to relevant international human rights treaties to support interpretation of the Constitution and of statutory laws.

In addition, lawyers should look to decisions by domestic courts to ascertain the accepted

³⁹ *Id* at para 60.

⁴⁰ African Commission Communication No. 245/2002 (2006) *available at* <http://www1.chr.up.ac.za/index.php/browse-by-subject/506-zimbabwe-zimbabwe-human-rights-ngo-forum-v-zimbabwe-2006-ahrlr-128-achpr-2006.pdf> (accessed 26 August 2013).

⁴¹ *Id* at para 143.

⁴² Constitution of the Republic of Malawi, 1994 *available at* <http://www.malawilii.org/mw/legislation/act/1994/20> (accessed 26 August 2013).

⁴³ Interpretation Act of Botswana 20 of 1984 [Chapter 01:04] *available at* <http://www.elaws.gov.bw/law.php?id=1399> (accessed 26 August 2013).

In addition, lawyers should look to decisions by domestic courts to ascertain the accepted relevance of international and regional law. In some countries, courts have held that international and regional law obligations should be looked at in interpreting rights under domestic law. For example, in Botswana, the Court of Appeal in *Attorney General v Dow*,⁴⁴ a case challenging a provision of the Citizenship Act as discriminatory against women, noted that though the provisions of the African Charter on Human and Peoples' Rights (African Charter) did not confer enforceable rights, it was nevertheless an important guide to the interpretation of national constitutional provisions. The Court further noted that constitutional provisions should be interpreted so as not to conflict with obligations under the African Charter. The Court held that:

Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the state until Parliament has legislated its provisions into the law of the land, in so far as such relevant international treaties and conventions may be referred to as an aid to construction of enactments, including the Constitution, I find myself at a loss to understand the complaint made against their use in that manner in the interpretation of what no doubt are some difficult provisions of the Constitution... I am in agreement that Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.⁴⁵

Likewise, in the Lesotho case of *Ts'epe v the Independent Electoral Commission and Others*⁴⁶ the Court of Appeal referred to several ratified, but undomesticated international and regional instruments including the African Charter, the ICCPR, CEDAW and the SADC Declaration on Gender and Equality in reaching its decision.⁴⁷ In the case, the appellant had challenged the constitutionality of a law that reserved one third of local government seats for women, contending that the law was discriminatory on the basis of sex. The Court of Appeal dismissed this argument and found that Lesotho was bound by its international obligations to take measures to promote women's equality. The Court specifically referred to article 18(4) of the African Charter.⁴⁸

The Tanzania High Court case of *Ephraim v Pastory*⁴⁹ found that a customary law rule denying daughters the right to sell inherited land "flies in the face of our Bill of Rights as well as the international conventions to which we are signatories" in discriminating

⁴⁴ (2001) AHRLR 99 (BwCA 1992) available at <http://www1.chr.up.ac.za/index.php/browse-by-country/botswana/1117-botswana-attorney-general-v-dow-2001-ahrlr-99-bwca-1992.pdf> (accessed 26 August 2013).

⁴⁵ *Id* at paras 108-109.

⁴⁶ AHRLR 136 (LeCA 2005) available at <http://www.chr.up.ac.za/index.php/browse-by-subject/343-lesotho-tsepe-v-the-independent-electoral-commission-and-others-2005-ahrlr-136-leca-2005-.html> (accessed 26 August 2013).

⁴⁷ *Id* at paras 17-21.

⁴⁸ *Ts'epe v the Independent Electoral Commission and Others supra* note 46 at para 20.

⁴⁹ AHRLR 236 (TzHC 1990) available at <http://www.chr.up.ac.za/index.php/browse-by-subject/469-tanzania-ephraim-v-pastory-2001-ahrlr-236-tzhc-1990.html> (accessed 26 August 2013).

against women.⁵⁰

In Kenya, the Court of Appeal considered Kenya's international law obligations when determining whether succession laws that disinherited women were discriminatory.⁵¹

In Nigeria, the Court of Appeal in *Mojekwu v Ejikeme*⁵² held that a cultural practice violated women's rights to non-discrimination, citing CEDAW in support of its findings.

The Nigerian High Court went further in 2004, in the case of *Odafe and Others v Attorney General and Others*⁵³ where it found that the refusal to provide HIV-positive, pre-trial prisoners access to antiretroviral treatment violated their right to enjoy the best attainable state of physical and mental health as guaranteed under the African Charter.⁵⁴ Though there is no right to health care in the Nigerian Constitution, the High Court held that Nigeria was obligated to provide for adequate medical treatment under the African Charter.⁵⁵

Lawyers should also look at decisions from their domestic courts in persuading a court to take into account comparative case law in determining the scope of domestic rights.

Courts in southern Africa have also referred to non-binding international and regional guidelines, especially when there is no relevant domestic jurisprudence, to interpret the breadth of domestic constitutional and statutory rights. For instance, a number of HIV-related cases have referred to International Labour Organisation's guidelines on HIV in adjudicating on HIV discrimination in the workplace.⁵⁶

Not all countries' judiciaries have directly examined the role of international, regional and comparative law in their domestic courts. If the courts have failed to do so in a given country (or have done so disfavouredly), then lawyers may look to similarly-situated countries where international, comparative and regional law have been used. This may assist the lawyer in crafting a compelling argument for why these sources of law should

⁵⁰ *Id* at para 10.

⁵¹ *Rono v Rono* (2005) AHRLR 107 (KeCA 2005) at para 24 available at <http://www.chr.up.ac.za/index.php/browse-by-subject/332-kenya-rono-v-rono-2005-ahrlr-107-keca-2005.html> (accessed 26 August 2013).

⁵² (2000) 5 NWLR 402. The summary is available at, http://www.equalrightstrust.org/ertdocumentbank/Mojekwu%20&%20others%20v%20Ejikeme%20&%20others%20_2000_%205%20NWLR%20402.pdf (accessed 26 August 2013).

⁵³ (2004) AHRLR 205 (NgHC 2004) available at <http://www.chr.up.ac.za/index.php/browse-by-subject/419-nigeria-odafe-and-others-v-attorney-general-and-others-2004-ahrlr-205-nghc-2004.html> (accessed 26 August 2013).

⁵⁴ *Id* at para 37.

⁵⁵ *Id* at para 34.

⁵⁶ **See**, for instance, *PFG Building Glass v CEPPAWU*, (2003) 5 BLLR 475 at para 77. Guidelines often represent multilateral consensus on best practices in a particular field, for example gender equality, health administration or HIV and AIDS, and can offer valuable insight into how the international community views human rights issues that may be too specific or "niche" to warrant separate conventions.

be accepted in his or her own jurisdiction. In applying this strategy, the lawyer must draw careful comparisons between the similarly-situated country and his or her own country, with specific reference to the case at bar.

2.3 Conclusion

International and regional law can be useful tools in assisting domestic courts to determine the scope of constitutional and other fundamental rights. In monist systems, where international and regional legal obligations are part of domestic law, lawyers can technically rely on international and regional obligations in litigation.

In dualist legal systems, where international and regional treaties have not been domesticated, lawyers may be able to rely on domestic constitutional provisions, previous court decisions relying on international and regional law and guidelines to persuade a court to take into account international and regional law. In addition, in cases where courts have not addressed international and regional law, lawyers can look to similarly situated countries in attempting to persuade a court to look to international and regional law.

Examples of Specific Rights Violations

Violations of a person's SRHR, such as failure to obtain informed consent prior to a health procedure or discriminating against specific populations in the provision of sexual and reproductive health services, infringe a number of fundamental human rights commonly found in international and regional instruments as well as national constitutions.

The table below looks at some of the common types of violations of women's sexual and reproductive self-determination and discrimination against specific populations in accessing sexual and reproductive health services. It considers the particular right violated by each act and the source of this right in international and regional human rights instruments. Note that in many instances, a single act may violate a number of or all of the different human rights set out below.

The table is not exhaustive nor is it intended to be. It merely highlights the major rights that are likely to be implicated in certain common situations. Any litigation should include brainstorming and research about other possible claims a litigant may have.

The international and regional treaties included in this table are:

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- Convention on the Rights of Persons with Disabilities (CRPD)
- African Charter on Human and Peoples' Rights (African Charter)
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol on Women)

Event	Human Right Implicated	Source
A health procedure (e.g. abortion or sterilisation) is conducted without voluntary and informed consent	Right to liberty and security of the person	Article 9(1) ICCPR Article 14 CRPD Article 6 African Charter Article 4 Protocol on Women
	Right to be protected from cruel, inhuman or degrading treatment	Article 7 ICCPR Article 15 CRPD Article 5 African Charter Article 4 Protocol on Women
	Right to dignity	Preamble ICCPR Article 5 African Charter Article 3(1) Protocol on Women
	Right to information (in particular, information relating to SRH)	Articles 10(h) CEDAW Article 23(1) CRPD Article 9 African Charter Article 14(2) Protocol on Women
A health procedure (e.g. abortion or sterilisation) is conducted with consent of person other than the patient	Right to privacy	Article 17(1) & (2) ICCPR
SRH services are provided in a way that discriminates against a population (e.g. pregnant women are tested for HIV without consent or a particular procedure is not offered to a specific group of women)	Right to health including SRH	Articles 12(1) & (2) ICESCR Articles 12(1), 12(2) and Article 14(2) CEDAW Article 25 CRPD Article 16 African Charter Article 14 Protocol on Women

Event	Human Right Implicated	Source
	Right to equality and non-discrimination	Article 2(1) ICCPR Article 2(2) ICESCR Articles 1 and 3 CEDAW Article 5 CRPD Articles 2 & 3 African Charter Article 2 Protocol on Women
	Right to life	Article 6(1) ICCPR Article 10 CRPD Article 4 African Charter Article 4 Protocol on Women